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COURT OF CRIMINAL APPEALS
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In the Court of Criminal Appeals of Texas

DAVID ASA VILLARREAL,
Appellant
v.
THE STATE OF TEXAS,
Appellee

State's Brief on the Merits
from the
Fourth Court of Appeals, San Antonio, Texas,
No. 04-18-00484-CR
Appeal from Bexar County

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IDENTITY OF TRIAL JUDGE, PARTIES, AND COUNSEL

The trial judge below was the **Honorable Jefferson Moore**, Presiding Judge of the 186th District Court of Bexar County.

The parties to this case are as follows:

1) **David Asa Villarreal** was the defendant in the trial court and appellant in the court of appeals, and he is the petitioner to this Honorable Court.

2) **The State of Texas**, by and through the Bexar County District Attorney's Office, prosecuted the charges in the trial court, was appellee in the court of appeals, and is the respondent in this Honorable Court.

The trial attorneys were as follows:

1) David Asa Villarreal was represented by **Alex J. Scharff** and **Alan Brown**, 222 E. Main Plaza, San Antonio, Texas 78205.

2) The State of Texas was represented by **Nicholas "Nico" LaHood**, District Attorney, and **Kimberly Gonzalez**, **Anna Ochoa Nelson**, and **Matthew L. Daniels**, Assistant District Attorneys, Paul Elizondo Tower, 101 W. Nueva Street, San Antonio, TX 78205.

The appellate attorneys are as follows:

1) David Asa Villarreal is represented by **Edward F. Shaughnessy, III**, 206 E. Locust, San Antonio, Texas 78212.

2) The State of Texas is represented by **Joe D. Gonzales**, District Attorney, and **Andrew N. Warthen**, Assistant District Attorney, Paul Elizondo Tower, 101 W. Nueva Street, San Antonio, Texas 78205.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument was requested and granted.

ISSUES PRESENTED

APPELLANT'S SOLE ISSUE
The court of appeals erred in holding that the trial court did not abuse its discretion in limiting the appellant's right to confer with his counsel during an overnight recess to matters other than his ongoing trial testimony.

STATE'S RESPONSE
The court of appeals correctly concluded that the trial court acted within its sound discretion when it instructed counsel to not discuss appellant's ongoing testimony with him during an overnight recess. But, even if the trial court abused its discretion, any error was harmless.

STATEMENT OF FACTS

The State challenges the factual assertions contained in appellant's brief. *See* Tex. R. App. P. 38.2(a)(1)(B). The State will supply supplemental pertinent facts supported with record references within its response to appellant's point of error. The Reporter's Record will be referenced as "RR," followed by its respective volume number. Exhibits will be referenced as "Ex.," followed by their respective number.

SUMMARY OF THE ARGUMENT

The limited non-conferral order here struck the proper balance between protecting appellant's rights and securing the integrity of the trial because it allowed discussion of all trial-related matters except appellant's ongoing testimony. Moreover, the fact that appellant's attorneys never expressed that the order would or actually did undermine their ability to effectively confer with him indicates that it adequately protected both the defendant's rights and the reliability of the factfinding process. Thus, the trial court acted within its sound discretion when it issued the limited non-conferral order here.

If, however, this Court finds error, the court of appeals should still be affirmed because any error was harmless. Any error here was not structural because it has not been labeled as such by the Supreme Court, nor did it affect the framework within which the trial proceeded. And the error was harmless because nothing in the record indicates that counsel were unable to effectively complete appellant's direct examination the next day. Further, the order had no effect on the outcome because, at the time the order was issued, the evidence against appellant was overwhelming, allowing the jury to find appellant guilty regardless of any other self-serving testimony he provided.

ARGUMENT

I. The trial court acted within its sound discretion.

Appellant contends that the trial court abused its discretion when it ordered his attorneys to not confer with him about his ongoing testimony during an overnight recess. Appellant's contention should fail because 1) the trial court's limited non-conferral order struck the proper balance between appellant's rights and the integrity of the factfinding process, and 2) nothing in the record indicates that appellant's attorneys were prevented from effectively conferring with him.

a. Abuse of discretion is the proper standard of review

The court of appeals reviewed the trial court's order for an abuse of discretion. *Villarreal v. State*, 596 S.W.3d 338, 341 (Tex. App.—San Antonio 2019, pet. granted). The dissenting opinion believed that this issue should be reviewed *de novo*. *Id*. at 343 (Martinez, J., dissenting). Appellant apparently agrees with the majority (Appellant's Br. 6), and for good reason, namely, the United States Supreme Court itself has recognized that a trial court's decision to issue a non-conferral order is reviewed for an abuse of discretion.

In *Geders v. United States*—the case upon which appellant chiefly relies—the Court recognized that "[a] criminal trial does not unfold like a play with actors following a script; there is no scenario and can be none." *Geders v. United States*, 425 U.S. 80, 86 (1976). Instead, "[t]he trial judge must meet situations as they

arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process." *Id*. "If truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings." *Id*. at 87. As will be discussed more below, the *Geders* Court ultimately determined that the trial court abused its discretion when it issued an absolute non-conferral order during an overnight recess. But, nonetheless, abuse of discretion is the standard by which it reviewed the trial court's order.

Later, in *Perry v. Leeke*, the Court concluded that a trial court can, in its discretion, order counsel and defendant to not confer about any topic during a brief recess while the defendant's testimony is ongoing. *Perry v. Leeke*, 488 U.S. 272, 283-85 (1989). It underscored the discretionary nature of such orders by noting that trial courts *may* prohibit all communications during short breaks in the defendant's testimony, but they are not *required* to do so. *Id*. at 282; *see also id*. at 284 n.8 ("[T]he judge *may* permit consultation between counsel and defendant during such a recess . . . ." (emphasis added)). Surely, if *absolute* non-conferral orders like the ones in *Geders* and *Perry* are reviewed for an abuse of discretion, then limited orders like the one here are too.

Moreover, this Court has recognized that potential infringement of other Sixth Amendment rights are reviewed for an abuse of discretion. *E.g.*, *Irby v. State*, 327 S.W.3d 138, 145, 154 (Tex. Crim. App. 2010) (holding that a trial court

does not abuse its discretion in excluding irrelevant impeachment evidence because the Sixth Amendment rights to confrontation and cross-examination may be limited by a trial court "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant"); *Webb v. State*, 766 S.W.2d 236, 240 (Tex. Crim. App. 1989) (recognizing that the Sixth Amendment right to call and compel witnesses is not absolute, and "[u]nder certain circumstances the exercise of sound discretion by the trial court will not act to violate the constitutional rights of an accused"). Thus, the fact that the order here potentially implicated a constitutional right does not render the standard of review less deferential.

Furthermore, the abuse-of-discretion standard is employed in circumstances where the trial court is in a better position to judge a situation, whereas *de novo* review is utilized when the trial and appellate courts have equal vantage points. *See State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004) ("The amount of deference appellate courts afford a trial court's rulings depends upon which 'judicial actor' is better positioned to decide the issue."). Here, reviewing judges were not present and thus not privy to the unspoken sense of the proceedings, whereas the trial court was present in the courtroom, allowing it to observe defense counsel and appellant and thereby determine whether a limited non-conferral order was necessary. Consequently, the court-of-appeals majority properly reviewed the

order under a deferential standard because the trial court was in the best position to evaluate the relevant actors and give orders designed to protect the integrity of the factfinding process. *See Geders*, 425 U.S. at 86 (noting that the trial court "is the governor of the trial for the purpose of assuring its proper conduct").

Finally, when reviewing whether a criminal defendant was deprived of counsel during only a portion of the trial, other Texas courts have applied the abuse-of-discretion standard. *See Burks v. State*, 227 S.W.3d 138, 144 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (citing cases, including *Geders* and *Perry*); *see also Schuldreich v. State*, 899 S.W.2d 253, 255 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd) ("The trial court may . . . , in its discretion, require an accused to not confer with his defense counsel.").

Accordingly, the limited non-conferral order at issue here must be reviewed for an abuse of discretion. Questions committed to the trial court's exercise of discretion are analyzed by inquiring into whether the trial court acted without reference to guiding rules and principles or, stated otherwise, whether the court acted arbitrarily or unreasonably. *Burks*, 227 S.W.3d at 145 (citing *Lyles v. State*, 850 S.W.2d 497, 502 (Tex. Crim. App. 1993)). If a trial court's discretionary ruling falls "within the zone of reasonable disagreement," it must be affirmed. *Id.* (citing *Wheeler v. State*, 67 S.W.3d 879, 888 (Tex. Crim. App. 2002)).

b. The non-conferral order was limited to appellant's testimony

In her dissenting opinion, Justice Martinez argued that the non-conferral order was absolute rather than limited to appellant's testimony. *Villarreal*, 596 S.W.3d at 345-46 (Martinez, J., dissenting). That is incorrect.

The State's case was conducted over two-and-half days. (RR3-5.) After the State rested, appellant opted to testify. (RR5 104.) During his direct examination, the trial court had to pause the proceedings and break for the day, whereupon the jury was released. (RR5 135-37.) The trial court then admonished appellant's attorneys to not confer with him about his testimony during the break. (RR5 137-39.)

During its admonishment, the trial court took pains to emphasize that appellant was allowed to speak with his attorneys about all other trial-related matters, and it specifically stated that they were only prohibited from discussing "[h]is testimony." (RR5 138); *see Villarreal*, 596 S.W.3d at 342 ("[T]he trial court . . . instruct[ed] Villarreal's attorneys not to discuss 'what you couldn't discuss with [Villarreal] if he was on the stand in front of the jury. . . . *His testimony*.'" (emphasis added)).

The trial court told counsel that they should ask themselves before they "talk to him about something, is this something that – manage [*sic*] his testimony in front of the jury?" (RR5 138.) If the trial court was issuing an absolute non-

conferral order, then it would not have assumed that they would speak to appellant "about something" at all. It certainly would not have specified that they should ask themselves whether the "something" they conferred with him about "manage[d]" his testimony.

If there were any remaining doubts about the scope of the order, one of appellant's attorneys confirmed that the trial court's admonishment made sense to him, while the other offered assurances to the trial court, stating, "We aren't going to talk to him about the facts that he testified about." (RR5 138.) Thus, in context, the trial court's non-conferral order was limited to his ongoing testimony, not any other matter, and appellant's attorneys understood the limited scope of the order.

c. The trial court's non-conferral order properly balanced appellant's rights with the integrity of the trial process

This case is one of several orbiting the twin stars *Geders* and *Perry*, the seminal Supreme Court cases that reviewed the propriety of non-conferral orders between defendant and counsel. Appellant likens this case to *Geders*. There, the trial court, concerned that Geders and his attorney would discuss his ongoing testimony, ordered counsel to not talk "about anything" with Geders during an overnight recess. *Geders v. United State,* 425 U.S. 80, 82 (1976). The *Geders* Court concluded that *absolute* prohibitions on overnight conferrals violate the constitutionally protected right to counsel, but it specifically declined to address the appropriateness of limited non-conferral orders, stating, "We need not reach,

and we do not deal with limitations imposed in other circumstances." *Id*. at 91.

In *Perry*, the Court addressed another absolute prohibition on attorney-client communications while the defendant's testimony was ongoing. There, at the conclusion of Perry's direct testimony, the trial court "declared a 15-minute recess, and, without advance notice to counsel, ordered that petitioner not be allowed to talk to anyone, including his lawyer, during the break." *Perry v. Leeke*, 488 U.S. 272, 274 (1989). After the break, Perry moved for a mistrial, which was overruled. *Id*.

The *Perry* Court upheld the conviction, holding that "when a defendant becomes a witness, he has *no constitutional right to consult with his lawyer while he is testifying*." *Id*. at 281 (emphasis added). It explained,

> [W]hen [the defendant] assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as well. Accordingly, it is entirely appropriate for a trial judge to decide, after listening to the direct examination of any witness, whether the defendant or a nondefendant, that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties, including his or her lawyer.

Id. at 282.

Here, because the trial court did not impose an absolute prohibition on attorney-client communications, *Geders* and *Perry* are not directly on point. The *Perry* Court, however, did contemplate a situation similar to the one presented

here, and indicated its approval of such limited non-conferral orders, stating that "the judge may permit consultation between counsel and defendant during such a recess, *but forbid discussion of ongoing testimony*." *Id.* at 284 n.8 (emphasis added). Such language sent a strong signal that non-conferral orders that merely limit communications about ongoing testimony do not impinge on the right to confer with counsel. *See United States v. Rosales*, 650 F. Supp. 2d 823, 829 (N.D. Ill. 2009) (highlighting *Perry*'s footnote 8), *aff'd*, *Gaya v. United States*, 647 F.3d 634 (7th Cir. 2011).

And that goes to the heart of the matter because, on a superficial level, the difference between *Geders* and *Perry* is the length of the recess—in *Geders* it was overnight, whereas *Perry* it was only 15 minutes. But such a surface-level reading ignores what the *Perry* Court highlighted as the real difference between the two: the *substance* of what one could *presume* would be discussed during the respective breaks.

The *Perry* Court differentiated the situation before it from the one in *Geders*, stating,

> The interruption in *Geders* was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's own testimony—matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea

bargain.

Id. at 284. Thus, when the Court stated that discussion of certain matters is constitutionally protected, and that those matters "go beyond" the defendant's "own testimony," it was necessarily saying that—at least while his testimony is ongoing—discussions of a defendant's own testimony are not constitutionally protected. That is the only reason to differentiate a defendant's testimony from other matters. And because it can be presumed that those constitutionally protected matters will be discussed during an overnight recess, then absolute prohibitions during such recesses run afoul the right to counsel.

During a short recess, however, "it is appropriate to presume that nothing but the testimony will be discussed[.]" *Id*. Accordingly, an absolute prohibition may be imposed. An overnight order to not confer about ongoing testimony therefore properly excises discussion of a non-protected matter from discussion of protected ones.

Justice Martinez's dissenting opinion emphasized the following language from *Perry*: "It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess." *Perry*, 488 U.S. at 284; *Villarreal*, 596 S.W.3d at 346 (Martinez, J., dissenting). But, in context, the Court's discussion of "unrestricted access" referred to the variety of "trial-related matters" discussed in the previous

sentence—i.e., the availability of other witnesses, trial tactics, and plea bargains—not ongoing testimony. *Perry*, 488 U.S. at 284. Thus, *Geders*'s command is fulfilled if a defendant can confer with his counsel overnight about "trial-related matters" other than his ongoing testimony.

Immediately after the above-quoted sentence, the *Perry* Court stated, "The fact that such [overnight] discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right"—that is, the right to discuss "trial-related matters." *Id.* The dissenting opinion misconstrued the "some consideration" language because it conflated the concept of "consideration" with "discussion." *Villarreal*, 596 S.W.3d at 346 (Martinez, J., dissenting). But the two terms are not synonymous.

Thus, an attorney may tell his client, "We can't discuss the substance of your testimony, but I highly recommend you take the plea bargain if it is still available." In such a scenario, discussion of a plea bargain has taken "consideration" of the defendant's testimony without discussing the testimony itself. The same is true if an attorney says, "I can't talk about your testimony, but you mentioned a Jane Smith during one of your answers. Do you have her address or phone number?" Again, that is not a discussion about the testimony. There is not any "coaching," "regrouping," or "strategizing" regarding the testimony itself. *See Perry*, 488 U.S. at 282. But the attorney is taking into consideration his client's testimony when

discussing another constitutionally protected "trial-related matter," i.e., the availability of another witness. *Id*. at 284.

That contrasts with a short recess where the presumption is that *only* the ongoing testimony will be discussed. In that scenario, the attorney is not merely taking into "consideration" the ongoing testimony when discussing other "trial-related matters"; instead, the attorney will *directly* discuss the ongoing testimony, and likely nothing else.[1]

In short, if the dispositive factor is the length of the recess, *Perry*'s focus on the substance of the matters discussed between attorney and client, and its emphasis on the importance of untainted cross-examination, make little sense. Consequently, as long as a defendant has access to his counsel to discuss other matters, the trial court can ensure a fair cross-examination by issuing a limited non-conferral order regardless of the recess's duration. *See Perry*, 488 U.S. at 283 ("Once the defendant places himself at the very heart of the trial process, it only comports with basic fairness that the story presented on direct is measured for its

[1] Several federal circuit courts have also mistakenly conflated "consideration" and "discussion." *See United States v. Triumph Capital Group, Inc.*, 487 F.3d 124, 132-33 (2d Cir. 2007) (discussing cases). For instance, the Ninth Circuit has stated, "[I]t is hard to see how a defendant's lawyer could ask him for the name of a witness who could corroborate his testimony or advise him to change his plea after disastrous testimony . . . without discussing the testimony itself." *United States v. Sandoval-Mendoza*, 472 F.3d 645, 651 (9th Cir. 2006). But, as demonstrated above, an attorney can easily *consider* the defendant's testimony when discussing those matters while not discussing the testimony itself. No doubt caution would have to be taken to ensure compliance with such a non-conferral order. But such caution may be the price to be paid to preserve the "truth-seeking function of the trial." *Perry*, 488 U.S. at 282.

accuracy and completeness by uninfluenced testimony on cross-examination.").

Thus, in the instant case, the trial court's limited non-conferral order "thread the needle" because protected matters (the availability of other witnesses, trial tactics, and possible plea bargains) could be discussed, whereas unprotected matters (ongoing testimony) could not. *Villarreal*, 596 S.W.3d at 342. Put another way, the trial court's admonishment harmonized two competing interests: Ensuring the integrity of appellant's testimony—i.e., by preventing potential "coaching," "regrouping," or "strategizing" about his ongoing testimony—while protecting his right to discuss other matters related to the case—e.g., "the availability of other witnesses, trial tactics, or . . . a plea bargain." *Perry*, 488 U.S. at 282, 284. Accordingly, the trial court's limited order ensured the best of both worlds, thereby maximizing the integrity of the trial. *Accord Beckham v. Commonwealth*, 248 S.W.3d 547, 553-54 (Ky. 2008); *State v. Conway*, 842 N.E.2d 996, 1020-21 (Ohio 2006); *Bailey v. State*, 422 A.2d 956 (Del. 1980); *see also Webb v. State*, 663 A.2d 452, 459-60 (Del. 1995) (approving limited non-conferral orders, but holding the one given there was insufficiently clear to defendant or counsel).

Furthermore, if it were otherwise—if trial courts were prohibited from imposing limited non-conferral orders during overnight recesses—then the defendant fortunate enough to receive an overnight recess while his testimony was ongoing would obtain a windfall that the short-recess defendant was deprived of.

But limited non-conferral orders like the one here place both such defendants on equal footing.

Simply, a deeper reading of *Geders* and *Perry* reveals that the trial court acted within its sound discretion when it balanced appellant's right to counsel with the reliability of the proceedings it was entrusted to oversee.[2]

d. Nothing in the record indicates that appellant's attorneys could not adequately confer with him about other trial-related matters

As explained above, when the trial court initially issued its non-conferral order, both defense attorneys indicated that they understood the limits of the order and their duties thereunder. (RR5 138.) Thus, appellant's attorneys made no argument or indication that the non-conferral order would actually stymie their ability to effectively communicate with him about other aspects of the case. While one attorney lodged an objection, it was more an afterthought, with the attorney stating that he made it "just for in the future[.]" (RR5 139.) He confirmed, however, that he understood "the court's judgment" and made no further attempts to explain how the order would encumber his direct examination of appellant when trial resumed. (RR5 139.)

One might forgive the attorneys for not making counter-arguments when the

[2] Appellant cites as support *United States v. Johnson*, 267 F.3d 376 (5th Cir. 2001). But, there, because the trial court placed an absolute bar on discussing the case in all respects, the Fifth Circuit found "the situation at bar indistinguishable from *Geders*." *Id*. at 379. Notably, it stated, "The court's order was not limited to [the defendant's] on-going testimony and the significance, if any, of such a limitation is not before us." *Id*. Thus, by its own terms, *Johnson* does not shed light on the propriety of the limited order in this case.

order was first issued because any difficulties in trying to navigate the confines of the order may not have been immediately apparent. But the next day, before appellant's testimony resumed, the trial court asked if either side had any issues to address, and one attorney replied, "Not from the defense at this time, Judge." (RR6 5.) The other attorney said nothing. That is, the attorneys made no complaint that the order undermined their ability to discuss other trial-related matters with appellant during the recess. One would think that if the attorneys could not have balanced their obligations to their client and the court, they would have explained that they encountered some difficulties and asked for a continuance. But they did not, which strongly indicates that the non-conferral order did not undermine their ability to confer with appellant about protected matters.

Moreover, if the limited non-conferral order actually did hinder the attorneys' ability to confer with appellant about protected matters, but such a hindrance was not apparent to them until his testimony resumed, then there was another remedy available: a motion for new trial. Tex. R. App. P. 21.3(a) ("The defendant must be granted a new trial . . . when [he] has been . . . denied counsel . . . ."). In affidavits accompanying the motion, they could have explained that they attempted to comply with the order while still discussing protected matters with appellant, but were unable to effectively do so without also discussing his ongoing

testimony. But, again, they did not.

Thus, the fact that appellant's attorneys never expressed that the order undermined their ability to effectively confer with him indicates that, unlike the absolute order in *Geders*, a limited non-conferral order can adequately protect both the defendant's rights and the integrity of the factfinding process. Indeed, if limited non-conferral orders rendered discussion of non-testimonial matters impossible, then *Perry*'s approval of such orders during short breaks would make little sense. *Perry*, 488 U.S. at 284 n.8. Either such orders can be complied with or they cannot—length of recess has no logical bearing on one's ability to comply.[3]

[3] The United States Court of Appeals for the Eleventh Circuit has adopted a similar rule. In that circuit, "a condition precedent to a *Geders*-like Sixth Amendment claim is a demonstration, from the trial record, that there was an actual 'deprivation' of counsel—i.e., a showing that the defendant and his lawyer desired to confer but were precluded from doing so by the district court." *United States v. Nelson*, 884 F.3d 1103, 1109 (11th Cir. 2018). An objection would seem to fulfill the actual-deprivation rule, *see id*. at 1109-10, and an objection was lodged here. But, as discussed previously, that objection was an afterthought, made merely for "the future," not because counsel actually desired to discuss appellant's testimony during the overnight recess. In fact, not only did counsel fail to assert that he wished to discuss appellant's testimony with him, he stated that he understood the order and confirmed that it made sense to him. (RR5 138-39.)

e. Limited non-conferral orders do not undermine the attorney-client privilege

Importantly, expecting some indication from defense counsel that they were unable to comply with the order does not infringe on the attorney-client privilege. Counsel would not have to go into the substance of any discussions that actually took place or which would have taken place absent the order. Instead, it would only be necessary to assert that they foresaw problems with complying, or that they attempted to comply but were unable to do so.

By way of analogy, when a defendant decides to testify or not, defense counsel often states that he discussed the matter with his client. Despite counsel's explanation that a discussion took place, the substance of the discussion is not revealed. The same is true here. Without revealing the substance of any attorney-client communications, attorneys could explain that they attempted to discuss protected matters but were unable to do so. Thus, concerns about impinging on attorney-client privilege are unfounded.

Accordingly, the court of appeals correctly concluded that the trial court acted within its discretion and should therefore be affirmed.

II. This Court should address the questions of structural error and harm.

The court of appeals found no error and therefore did not address whether any error was structural or harmful. Typically, in such a scenario, if this Court does find error, it remands to the court of appeals to address harm. *See Jordan v. State*, 593 S.W.3d 340, 346 (Tex. Crim. App. 2020). But, as explained further below, the question of harm is different from other types of questions that courts of appeals leave unanswered, and, therefore, if this Court finds error it should address harm itself.

If this Court does not agree, however, that it should regularly address harm in the first instance, it should still address harm here. First, the issue of whether any error here is structural has already been briefed by the parties, *see id*., and a finding of structural error would obviate the need for another round of appellate review. Second, "if the resolution of [harm] is 'clear' or 'plain,' then judicial economy justifies this Court in reaching the issue in the first instance." *Id*. As discussed below, any error here was clearly harmless. Therefore, if error is found, this Court should address the issue of harm for that reason as well.

a. Error and harm are part and parcel, meaning the latter should be addressed when this Court finds the former

To gain relief, error alone is not enough; instead, there must be *harmful* error. Thus, error and harm are really two sides of the same coin. Error's dependence on harm, then, makes harm unlike other questions that are properly remanded to the courts of appeals because judicial economy is served by addressing what necessarily must be addressed to gain relief.

The interests of the parties and victims are also served by addressing harm in this Court. The appellate process often takes years, especially when a case bounces back and forth between a court of appeals and this Court. The concerns of a delayed trial—unavailable witnesses, faded memories, trial anxiety, litigation costs, *et cetera*—are greatly eased if harm is addressed by whatever court finds error first. Thus, expeditious resolution of whether error was harmful serves the interests of the judiciary, defendants, the State, and victims alike. Therefore, if this Court finds that error occurred, it should conduct its own harm analysis in the first instance.

b. At the very least, this Court should determine if any error is structural

Even if this Court does not address harm, it should decide whether the error was structural. This brief argues below that any error should not be found structural. Appellant has also briefed the issue. In his brief, he argues that this is *Geders*-like error, which, he claims, requires reversal without a showing of "prejudice." (Appellant's Br. 9-10.) As will be discussed more below, "prejudice" is not synonymous with "structural error," but appellant treats them the same, meaning he has effectively addressed the issue of structural error. Additionally, in his prayer, he requests that the case be remanded to the trial court for a new trial (Appellant's Br. 14)—that is, he seeks the relief that would result from a finding of structural error. As a result, the parties have briefed this issue, making it appropriate for this Court to address it in the first instance.[4] *Jordan*, 593 S.W.3d at 346.

Furthermore, since a finding of structural error obviates the need to conduct a harm analysis, a speedy resolution of the question serves the interests of justice by allowing a new trial to begin sooner rather than potentially much later.

[4] Additionally, the dissenting opinion below concluded that any error was structural. Thus, the court of appeals has at least contemplated this issue, even if the majority did not have need to directly address it.

III. Any error was not structural.

a. The Supreme Court has not labeled the alleged error "structural"

In Texas, only federal constitutional errors deemed "structural" by the United States Supreme Court escape a harmless-error analysis. *Gray v. State*, 159 S.W.3d 95, 96-97 (Tex. Crim. App. 2005); *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997). This Court has recently debated whether the above-stated rule, first announced in *Cain*, survived the enactment of Rule of Appellate Procedure 44.2(a). *Compare Lake v. State*, 532 S.W.3d 408, 417 n.46 (Tex. Crim. App. 2017) (plurality op.), *with id*. at 418-20 (Yeary, J. concurring). The State urges this Court to continue to adhere to the *Cain* rule, however, because it seems to have been incorporated into Rule of Appellate Procedure 44.2(a).[5]

Thus, because the Supreme Court has never directly addressed whether a trial court may issue a limited testimonial non-conferral order during an overnight

[5] As noted by the *Lake* plurality, when the rule was first announced, Rule 44.2(a) had been submitted for public comment and it was approved shortly thereafter. *Id*. at 417 n.46. It seems unlikely that *Cain*'s "broad statement of new law" would have been made just to be replaced in a few months' time. *Id*. Moreover, as recounted by the plurality, after Rule 44.2(a) went into effect, this Court continued to apply the *Cain* rule even in circumstances where it had previously held no harm analysis applied. *Id*. In other words, this Court has repeatedly acknowledged that the *Cain* rule survived the adoption of Rule 44.2(a), going so far as to overrule its prior precedents to ensure its application.

recess, it has obviously not labeled such alleged error "structural."[6] But, as noted previously, appellant equates presumed prejudice with structural error, and thereby claims that *Geders* error is structural. But those concepts are not the same.

Lake was a plurality opinion only because of the above-discussed debate. The substantive discussion was endorsed by a majority of the Court. *See Lake*, 532 S.W.3d at 418 (Yeary, J. concurring). The *Lake* Court addressed "whether the denial of closing argument at a community-supervision revocation proceeding is the sort of error that is exempt from a harm analysis." *Id*. at 409. The lower court had concluded that such a denial violated the Supreme Court's holding in *Herring v. New York*, 422 U.S. 853 (1975), and remanded for a new trial without conducting a harm analysis. *Id*. at 410.

This Court reversed. In doing so, it considered whether a presumption of prejudice was the same as labeling an error structural. It concluded that such

[6] The errors deemed structural by the Supreme Court are few and far between. *McCoy v. Louisiana*, 138, S. Ct. 1500, 1511-12 (2018) (trial court's allowance of counsel to concede that defendant committed the charged offenses over defendant's objections); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016) (unconstitutional failure to recuse on the part of an appellate court justice); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-52 (2006) (denial of the right to counsel of choice); *Sullivan v. Louisiana*, 508 U.S. 275, 278-79 (1993) (giving a constitutionally deficient instruction on reasonable doubt); *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (exclusion of venire members from a jury in a capital case of those opposed to the death penalty but who can set aside their feelings to follow the law and their oath as a juror); *Batson v. Kentucky*, 476 U.S. 79, 97-98 (1986) (discriminatory exercise of peremptory challenges against members of the defendant's race from the jury); *Vasquez v. Hillery*, 474 U.S. 254, 261 (1986) (unlawful exclusion of members of the defendant's race from a grand jury); *Waller v. Georgia*, 467 U.S. 39, 49-50 (1984) (denial of a public trial); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of the right to self-representation at trial); *Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963) (total deprivation of the right to counsel at trial); *Tumey v. Ohio*, 273 U.S. 510, 532-34 (1927) (denial of an impartial judge).

concepts are not interchangeable. *Id*. at 413-16.

When the Supreme Court presumes prejudice, it merely "does not wish to impose the burden of showing harm upon defendants . . . ." *Id*. at 416. But that "does not preclude the presumption of harm being rebutted" by a constitutional harmless-error analysis. *Id*. Thus, presumption of prejudice does not preclude a harm analysis—that is, presumptively prejudicial errors are not structural.

Furthermore, the *Lake* Court noted that while the Supreme Court occasionally listed out its structural-error cases, it had never included *Herring* in such listings. *Id*. at 412-13. Likewise, *Geders* has never been included in such listings. In fact, in the Supreme Court's most recent discussions of structural error, *Geders* is never discussed, mentioned, or cited. *See McCoy v. Louisiana*, 138, S. Ct. 1500, 1511-12 (2018); *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017).

Moreover, the *Lake* Court itself recognized that *Geders* falls into the category of presumed-but-rebuttable prejudice, not structural error. *Lake*, 532 S.W.3d at 416 n.43. It noted that *Perry* had recognized that several lower courts had found *Geders* error to be harmless, and that *United States v. Cronic* included it—along with *Herring*—in a list of cases where prejudice was merely presumed. *Id*. (citing *Perry*, 488 U.S. at 277 n.2; *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984)).

Accordingly, under the *Cain* rule, because the Supreme Court has not

labeled the alleged error here "structural," such error must be reviewed for constitutional harm.

b. Even if the Cain rule is inoperative, any error here is not structural

Structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). With regards to the right to counsel, the "Supreme Court has classified only *total* deprivation of counsel as structural error." *Burks v. State*, 227 S.W.3d 138, 144 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). That is so because the "entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant . . . ." *Fulminante*, 499 U.S. 309-10.

Here, appellant did not suffer a total deprivation of counsel because at no time was he unable to confer with his attorneys. Instead, the trial court merely ordered counsel to not discuss one specific topic—appellant's ongoing testimony—during one particular recess. "To be immune from a harm analysis, a violation of the right to counsel must 'pervade the entire proceeding.'" *Lake*, 532 S.W.3d at 414 (quoting *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988)). Obviously a limited restriction during a limited period does not pervade the *entire* proceeding.

Moreover, as discussed previously, the *Perry* Court specifically held that

"when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Perry*, 488 U.S. at 281. It would be odd, indeed, if a defendant such as Perry, who was prevented from speaking with his attorney about anything, suffered no constitutional violation whatsoever, while someone in appellant's shoes, who could confer with his counsel about any non-testimonial matter, suffered not only a violation of his rights but one so significant that the framework of the trial itself was affected. That cannot possibly be right.

Furthermore, the alleged error is not amendable to any of the three broad rationales underlying a finding of structural error. First, error may be structural "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Weaver*, 137 S. Ct. at 1908. But, while important, there is nothing about the attorney-client relationship unrelated to protecting the defendant from erroneous conviction. That is the entire point of the relationship. Thus, there is no other interest to be protected.

Second, "if the effects of the error are simply too hard to measure" it may be structural. *Id*. As will be discussed in greater detail below, because the evidence adduced up until the order was issued was overwhelming, any error here had little if any effect on the outcome of the case. As a result, the effects of any error are actually quite easy to measure.

Finally, an error may be structural if the resulting trial is always

"fundamentally unfair." *Id*. It is hard to see how imposition of a limited non-conferral order would always result in a fundamentally unfair trial when 1) it merely imposes a limited restriction on counsel for a limited time, 2) trial courts are empowered to foster a trial's "truth-seeking function" by restricting discussion about a defendant's ongoing testimony, and 3) the evidence presented against a defendant may be overwhelming, as it was against appellant here. Further, imposition of such orders is certainly no more unfair than deficient performance by one's counsel, the denial of the right to consult with counsel before submitting to psychiatric examinations, or denying counsel the ability to make a closing statement, all of which are subject to harm or prejudice analyses. *Strickland v. Washington*, 466 U.S. 668 (1984); *Satterwhite*, 486 U.S. at 256-58; *Lake*, 532 S.W.3d at 417-18.

Accordingly, any error here is not structural and, therefore, subject to a constitutional-error analysis.

IV. Any error was harmless beyond a reasonable doubt.

"If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction . . . unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction . . . ." Tex. R. App. P. 44.2(a). To conclude beyond a reasonable doubt that a constitutional error did not contribute to the conviction, the harmlessness of the error must be "obvious." *Lake v. State*, 532 S.W.3d 408, 416 (Tex. Crim. App. 2017) (plurality op.). Here, it was.

a. Failure to express a desire to discuss ongoing testimony indicates that appellant was not harmed

As discussed above, appellant's attorneys failed to give any indication—either when the order was issued, the next day, or in a motion for new trial—that they actually desired or needed to discuss his ongoing testimony with him during the overnight recess. That shows that the order could be complied with because protected matters could still be discussed, and was therefore not erroneous. But it also establishes that appellant suffered no harm.

If the non-conferral order here were not "obviously" harmless, one would expect that appellant's attorneys would have expressed some concerns they anticipated or difficulties they actually encountered. But they did not. There is simply no indication in the record that they were hindered in their ability to cogently continue their direct examination the very next day. The examination

continued just as it would have in the event of a short break. Therefore, since the order had no ill effect on the attorneys' examination, then any error was obviously harmless.

b. The evidence against appellant was overwhelming

This Court has held that, "in a harm analysis under Rule 44.2(a), 'the presence of overwhelming evidence supporting the finding in question can be a factor in the evaluation of harmless error.'" *Motilla v. State*, 78 S.W.3d 352, 358 (Tex. Crim. App. 2002) (quoting *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000)). The Supreme Court has recognized the same when determining whether error was harmless beyond a reasonable doubt. *Milton v. Wainwright*, 407 U.S. 371, 372-73 (1972). Here, at the time the order was issued, the evidence of appellant's guilt was overwhelming and very unlikely to be contravened.

Before the order was issued, appellant testified that he stabbed his boyfriend, Aaron Estrada, with a knife. (RR5 126-28.) Dr. Rajesh Kannan of the Bexar County Medical Examiner's Office confirmed that Estrada died by stabbing. (RR4 74-75, 82, 89.) Therefore, the evidence established all the elements of the offense beyond a reasonable doubt.

Appellant claimed, however, that he acted in self-defense because Estrada "grabbed" and "started choking" him. (RR5 127.) But, when the overnight recess

was taken, the jury had heard enough evidence to easily reject appellant's self-serving story.

Veronica Hernandez, a friend of appellant and Estrada, testified that the two men lived together. (RR3 188-89.) The night before the murder, Hernandez saw Estrada and appellant at their apartment, and they "seemed fine" and "weren't arguing." (RR3 191-93, 195.) She planned on staying the night, but did not do so because Estrada sent her a text message saying he "was trying to make peace with" appellant, indicating to her that they may have been having relationship problems. (RR3 192, 195-96.)

Hernandez went home. (RR3 198.) The next morning, she received a frantic phone call from Jimena Valenzuela, another mutual friend and appellant's paramour. (RR3 198-99.) After their conversation, Hernandez went to Estrada's apartment. (RR3 199.) There, she found that the front door was not "closed all the way," and a motorcycle usually driven by appellant was "directly in front of the door" as if it were "blocking it." (RR3 194, 200.)

Hernandez entered the home and immediately froze because she saw blood at the entryway. (RR3 201.) She ran up the stairs, which also had blood smears, and, there, saw Estrada's body in a "semi-fetal position[.]" (RR3 202.) Estrada was unresponsive, so Hernandez attempted to call 911 from the cordless phone in the apartment office. (RR3 202.) The power had been cut off, however, so she

used her cell phone instead. (RR3 202.) When EMS arrived, they asked Hernandez to direct them to the power box so that "they could flip the breakers" because "the power was completely off." (RR3 203-04.)

At the crime scene, a pair of bloody scissors were found in a basket. (RR4 28; State's Exs. 31, 37, 40, 64.) Multiple pieces of a blood-stained broken knife were also found. (State's Exs. 39, 44, 48, 51, 52, 56, 66, 67, 69.) Notably, as will become relevant below, no gun was found in the open area of Estrada's apartment, but one was found in a locked safe. (RR3 179; RR5 95.)

Valenzuela also testified. She explained that she, Estrada, and appellant regularly "smoke[d] meth" together. (RR4 196.) She stated that a few days before the murder, appellant arrived at her workplace claiming to have seen "people dumping bodies in bags into a hole" at his work. (RR4 198.) Appellant seemed "agitated" and "upset" when he told Valenzuela his strange story, so she agreed to accompany him to the work site to see it for herself. (RR4 198-99, 205.)

But instead of taking appellant to his work site, Valenzuela decided to go to Estrada's apartment. (RR4 205.) When asked why she went there instead, she stated that, several years before, she too had "suffered a lot of audio hallucinations" similar to the one appellant was suffering, so she began to think "maybe there was some truth to" appellant's story, and she and appellant wanted Estrada to join them. (RR4 205-06.)

Valenzuela stated that appellant did not appear to be under the influence of drugs at that time; however, she and appellant "were high all the time." (RR4 205.) She also confirmed that she and appellant believed they were being followed. (RR4 206.)

When they reached Estrada's apartment, he declined to join in their paranoid adventure, stating that the two were "crazy." (RR4 206-07.) They then decided to drive to Austin to visit appellant's ex-girlfriend, Naomi, whom appellant wanted to see because he believed that "her neighbors were holding her hostage against her will." (RR4 207.)

In Austin, appellant "knocked on Naomi's door for a long time." (RR4 208.) Naomi eventually peeked outside to reassure appellant that she was fine. (RR4 208.) Appellant returned to Valenzuela's truck, but, not satisfied that the person he had just seen was actually Naomi, he went back and began knocking again. (RR4 208.) Naomi, understandably, refused to go outside, so appellant and Valenzuela called the police. (RR4 208-09.) The police arrived and confirmed that Naomi was fine, but appellant had doubts that the police were legitimate. (RR4 209.) Valenzuela, however, convinced appellant that everything was all right, and they returned to Valenzuela's apartment in San Antonio. (RR4 209.)

At some point, appellant had thrown his phone away because he believed that "they" could follow him and Valenzuela via their phones. (RR4 209-10.)

Valenzuela had no cable, internet, or phone in her home, so she left appellant alone there and went to work. (RR4 210.)

When Valenzuela returned home from work, she found appellant reading a vampire-themed book by Anne Rice, titled "Memnoch the Devil." (RR4 210.) While he seemed relaxed, appellant told Valenzuela that he saw numerous similarities between the main character and himself, as well as between other characters in the book and people in his life. (RR4 210.)

Appellant and Valenzuela then left to go to Estrada's apartment, but stopped for gas along the way. (RR4 211.) At the station, Valenzuela told appellant about how, on a previous occasion when appellant went missing, she and Estrada were able to locate appellant through Naomi's Facebook photos. (RR4 211.) Upon hearing that information, appellant "totally freaked out" because he thought Valenzuela and Estrada were "conspiring against Naomi." (RR4 211.)

When they arrived at Estrada's apartment, appellant told Valenzuela to stay in the truck so that he could speak with Estrada. (RR4 211-12.) Appellant was in the apartment for "a while," but he eventually exited with some personal paperwork. (RR4 212.) Estrada was "agitated," which was unlike him, and "practically kicking [appellant] out." (RR4 212, 215.)

Appellant and Valenzuela left, and began to locate "Misty," a "spiritual healing" therapist whose business card was in appellant's wallet, though he

disclaimed knowing how the card got there. (RR4 211, 212-13.) En route, they saw a "bulletin board of a missing child" next to a taco truck, and appellant swore "that that's where [they were] going to get [their] answers." (RR4 215-16.) He asked the truck vendor, "What's good off the menu," which Valenzuela explained was his way of "following leads." (RR4 217.) Such abnormal behavior and thoughts were in keeping with what Valenzuela described as the "map" guiding the pair's shared paranoid odyssey, on which they concocted bizarre plans, looked for security cameras and videos, believed people were speaking to them in code, and followed what they believed were signs and clues of a greater message. (RR4 217-18.) Valenzuela candidly admitted that she and appellant were "crazy." (RR4 218.) At some point along their expedition, she also dissuaded appellant of the notion that he needed to carry any weapons with him because, if the situation warranted, "anything could be a weapon." (RR4 214-15.)

Later, appellant and Valenzuela returned to Estrada's apartment because appellant wanted her to "find out what [Estrada] knew." (RR4 214.) Appellant also told her to kill Estrada. (RR4 214.)

Valenzuela testified that on the day of the murder, around 3:00 a.m., she went to Estrada's apartment to "make sure everything was fine" between him and appellant. (RR4 193-94.) She felt the need to do so because of the "eventful" previous few days. (RR4 194.) When she arrived, "everything was okay,

everybody was happy," so she only stayed a few minutes. (RR4 194-95, 224, 243.)

She went home, but returned to Estrada's apartment a few hours later to "smoke meth," and met Estrada outside. (RR4 197.) A friend of his had just left, and he "seem[ed] fine." (RR4 197.) When she saw appellant, however, he was "agitated[.]" (RR4 197.) She did drugs with appellant, and then left for work. (RR4 197.)

Later that day, appellant arrived at Valenzuela's work driving Estrada's car. (RR4 198.) When she saw him, his hand and clothes were "full of blood." (RR4 200, 224.) She asked him if he was all right, and he replied that he was. (RR4 200.) She then inquired about Estrada, and appellant indicated that he was not all right, whereupon she called Hernandez and told her to check on Estrada. (RR4 200.)

When Valenzuela returned to appellant, he was "agitated" and stated, "We got to go," and, "This is his car. We shouldn't be in his car." (RR4 200-01.) Valenzuela testified that she had previously told the police that appellant said, "I did it." (RR4 202-03.) Appellant never mentioned to Valenzuela that he and Estrada had been in a fight, but he did say that he had to grab the scissors because the knife had broken. (RR4 221-22.) She also testified that appellant told her that he had to hold a knife to Estrada's throat because he had seen Valenzuela's daughter's face in one of Estrada's security videos. (RR4 221-22.)

Appellant and Valenzuela then left her workplace and went to her apartment. (RR4 201.) Later, appellant absconded from her apartment by jumping off a balcony, and was eventually located by the police at Naomi's home in Austin. (RR4 124, 226.)

Officer Thomas Villarreal stated that, when located, appellant was wearing a clean shirt, but his pants were bloody, and he was clutching a hand towel because of a "bad laceration to his right hand." (RR4 125.) After appellant was arrested, he asked the officer to tell Estrada's parents and grandparents that he was sorry, and that Estrada "didn't deserve it." (RR4 127, 141-42.) Also, unprompted, appellant stated, "Tell him he was innocent. He didn't deserve what happened to him." (RR4 128, 142-43.) Further, appellant said that he wanted Estrada back and that he heard his voice. (RR4 128, 141-42.) Later, when appellant was being booked into jail, he said, "Just take me somewhere and shoot me. I don't deserve jail. Take me to his grandparent's house so they can just kill me." (RR4 131-32, 143.)

As stated above, appellant testified that he stabbed Estrada. He also admitted that on the morning of the murder, he had used drugs. (RR5 116.) Before the stabbing, a man named Eric was at the apartment. He and Estrada were having a conversation away from appellant, but they were close enough to where appellant could overhear Eric make a comment which upset appellant. (RR5 116-

18.)

Later, appellant confronted Estrada about Eric's comment, but Estrada said it was just a joke. (RR5 120.) Appellant insisted on discussing it, and he asked Estrada to turn off his phone, computer, and security cameras because he was "paranoid" that he was being watched. (RR5 120-21.) Estrada refused to shut anything off, and instead "was just kind of blowing [appellant] off." (RR5 121-22.) Appellant became "very frustrated" and "turned off all the breaker switches in the breaker box." (RR5 122.) That, in turn, caused Estrada to "storm[] out," which was unusual behavior for him, making appellant "scared." (RR5 122.)

After Estrada left the room, appellant pulled out the smoke detectors because, he claimed, he had previously found a camera in one. (RR5 124.) Appellant, believing that Estrada was retrieving a gun from a safe, grabbed a knife from the dishwasher and placed it in his back pocket. (RR5 126-27.) Estrada then returned, asked why appellant pulled the smoke detectors out, and grabbed and choked appellant, whereupon appellant stabbed Estrada several times. (RR5 127-28.)

When the altercation was over, Estrada was "motionless on the ground." (RR5 129.) Appellant, however, did not call 911. (RR5 129.) Instead, he changed his shirt and absconded. (RR5 130, 132.) When asked about the bloody scissors found in the apartment, he claimed he did not know whether he used them. (RR5

132.) After he spoke to Valenzuela, he went to her apartment, but eventually "freaked out" and fled to Austin by himself. (RR5 132-35.) At that point in appellant's testimony, the court recessed for the evening, at which time the complained-of order was issued.

Based on the foregoing, the evidence of appellant's guilt was so overwhelming that the limited non-conferral would have had no effect on the outcome of the trial. Even crediting appellant's version of events, the jury could have concluded that he did not have a reasonable belief that deadly force was necessary because Estrada never actually recovered a gun from the safe and was, therefore, unarmed. *See* Tex. Penal Code Ann. §§ 9.31, 9.32. Nothing appellant said the next day would have changed that fact, meaning conferring with his counsel about his testimony would not have made any difference.

Further, because appellant armed himself with a knife and hid it in his pocket, the jury could have completely disbelieved his claim that Estrada attacked him first, and instead believed appellant's attack was premeditated. Appellant's claim was further undermined by the fact that he could not account for the bloody scissors, which were conspicuously hidden in a basket, and Valenzuela's testimony that appellant told her he grabbed the scissors after the knife had broken. Notably, appellant did not make any mention to Valenzuela about a fight between him and Estrada, whereas he made an outlandish claim that he saw her daughter's face on a

security video. Estrada's unlikeliness to attack appellant was also supported by Valenzuela's account that he was in a good mood when she saw him shortly before the murder, and also by Estrada's text to Hernandez, where he expressed a desire to make peace with appellant.

Appellant, on the other hand, was "agitated" and "paranoid" in the days leading up to the murder, and on the morning thereof. The record supported an inference that Estrada's murder was the inevitable conclusion to a days-long, meth-induced rampage, spurred on by appellant's bizarre paranoid delusions that he was being watched or that Naomi was in danger, including a specific belief that Valenzuela and Estrada were "conspiring against Naomi." In fact, in his fear and loathing, appellant actually instructed Valenzuela to kill Estrada.

Finally, the non-conferral order could not have affected appellant's ability to give the jury his version of events because, by the time the order was issued, he had already done so and moved on to recounting his flight from the scene and attempts to hide. *See Clay v. State*, 240 S.W.3d 895, 905 & n.11 (Tex. Crim. App. 2007) (noting that evidence of flight evinces a consciousness of guilt). And, because his testimony had already been thoroughly discredited by that time, any *post hoc* modification or clarification of his story would only have further eroded his already damaged credibility. Consequently, no conferral between appellant and his counsel about his testimony would have made any difference from that point

forward.

Accordingly, because the trial court's limited non-conferral order had no effect on the trial's ultimate outcome, it was harmless beyond a reasonable doubt. Therefore, the court of appeals should be affirmed.

PRAYER FOR RELIEF

Counsel for the State prays that this Honorable Court AFFIRM the court of appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Andrew N. Warthen, hereby certify that the total number of words in this brief is 9,241. I also certify that a true and correct copy of this brief was emailed to appellant David Asa Villarreal's attorney, Edward F. Shaughnessy, at Shaughnessy@gmail.com, and to Stacey Soule, State Prosecuting Attorney, at information@spa.texas.gov, on this the 18th day of August, 2020.

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